Supreme Court, U. S.
FILED
AUG 8 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-212

PHILIP D. ROGERS,
Petitioner,

vs.

NICK P. CHILIVIS, COMMISSIONER,
DEPARTMENT OF REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

PHILIP D. ROGERS
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Petitioner Philip D. Rogers respectfully petitions for a Writ of Certiorari to review the judgment of the Court of Appeals of Georgia entered in this case on February 8, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals of Georgia (Appendix A) is reported at 141 Ga. App. 407 (1977). The order of the Court of Appeals of Georgia denying Motion for Rehearing (Appendix B) and the orders of the Supreme Court of Georgia denying Application for Certiorari (Appendix C) and denying Motion for Reconsideration (Appendix D) are not officially reported.

JURISDICTION

The opinion of the Court of Appeals of Georgia was entered on February 8, 1977. Motion for Rehearing was denied by the Court of Appeals of Georgia on February 25, 1977. Motion for Stay of Remittitur pending application to the Supreme Court of the United States for a Writ of Certiorari was granted by the Court of Appeals of Georgia on May 20, 1977. This court has jurisdiction under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether income earned in a foreign country before becoming a resident, but received after becoming a resident, is taxable income in Georgia.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

This case involves the Commerce Clause of the Constitution of the United States and certain income tax sections of the Georgia Code Ann.

The Constitution of the United States, Article I, Section 8, Clause 3, states:

"The Congress shall have Power . . . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Georgia Code Ann. states:

§92-3101(a) "A tax is hereby imposed upon every resident of the State, which tax shall be levied, collected and paid annually, with respect to the Georgia taxable net income of the taxpayer as

hereinafter defined; and upon every non-resident with respect to his Georgia taxable net income not hereinafter exempted, received by such taxpayer from services performed, property owned or from business carried on in this State, computed in accordance with the following tables: . . . . ."

§92-3118(a) The net income shall be computed upon the basis of the taxpayer's annual accounting period in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commission does clearly reflect the income . . . . ."

STATEMENT OF THE CASE

Petitioner became a resident of the State of Georgia on November 1, 1971. He received cash in 1972 and 1974 in payment of income earned during the period from 1969 to 1971 while he was a resident of the country of Greece. Petitioner filed Joint Georgia Individual Income Tax Returns for 1972 and 1974 with Carol A. Rogers, his wife, and excluded these cash receipts from taxable income on the basis that these amounts represented *income earned in a foreign country and earned before the taxpayer became a resident of the State of Georgia;* that, these amounts represented the collection of receivables, not income.

Respondent examined these returns and assessed additional income taxes of $1,188.30 and interest of

$222.81 for 1972 and additional income taxes of $2,448.06 and interest of $165.24 for 1974 on the basis that income is taxable in Georgia in the year the income is received by the taxpayer.

Petitioner discussed the assessments for additional income taxes and interest with Respondent in an informal conference on November 12, 1975 and presented the reasons why the assessments should be eliminated. Respondent issued a notice of deficiency and demand for payment of the additional income taxes and interest in a letter dated January 6, 1976.

Petitioner appealed the decision of Respondent to the Superior Court of DeKalb County on January 8, 1976. The Superior Court of DeKalb County dismissed Petitioner's request to set aside the assessments for additional income taxes and interest and granted Respondent's Motion for Judgment in its order dated August 30, 1976.

Petitioner appealed the Judgment of the Superior Court of DeKalb County to the Supreme Court of the State of Georgia on September 2, 1976. The Supreme Court of Georgia transferred the case to the Court of Appeals of Georgia in its order dated October 6, 1976. The Court of Appeals of Georgia affirmed the decision of the trial court in its opinion dated February 8, 1977. Petitioner's Motion for Rehearing was denied by the Court of Appeals in its order dated February 25, 1977.

Petitioner applied to the Supreme Court of Georgia for a Writ of Certiorari and this application was denied in its order dated April 22, 1977. Petitioner's Motion for Reconsideration was denied by the Supreme Court of Georgia in its order dated May 11, 1977.

Petitioner read into the record of the trial court his contention that the taxing of income earned in a foreign country and earned prior to the date he became a resident of the State of Georgia would be unconstitutional under the Commerce Clause of the Constitution of the United States. This same contention was raised in the Court of Appeals of Georgia by the submission of brief and oral argument. Petitioner is not aware of any proceeding in either the trial court or the Court of Appeals of Georgia in which the court addressed the question of whether or not the Commerce Clause would prohibit the State of Georgia from taxing such income. The pertinent portion of the record of the trial court wherein this contention was raised is included in Appendix E.

Petitioner also read into the record of the trial court his contention that the taxing of income earned before becoming a resident, but received after becoming a resident, was beyond the taxing jurisdiction of the State of Georgia. This same contention was raised in the Court of Appeals of Georgia by the submission of brief and oral argument. The trial court took the position that income is taxable at the time the income is received by the taxpayer without regard to when it is earned and this position was affirmed by the Court of Appeals of Georgia.

By Petition for a Writ of Certiorari, Petitioner seeks review of the decision of the Court of Appeals of Georgia regarding the taxability of income earned by the Petitioner in a foreign country and earned prior to the date he became a resident of the State of Georgia.

REASONS FOR GRANTING THE WRIT

Introduction

This court should review the decision of the Court of Appeals of Georgia because that court has decided two important questions of Federal law which have not yet been settled by this court. The Court of Appeals of Georgia, in affirming the decision of the trial court, held that income earned by a cash basis taxpayer before becoming a resident is taxable under the Public Revenue Code if actually or constructively received after becoming a resident. In so holding, the Court of Appeals of Georgia has sanctioned an entirely new concept in the taxing of its citizens — that is, *residence has no bearing on the State's power to tax*. Such a concept is beyond belief!

The Court of Appeals of Georgia, in affirming the decision of the trial court, held that income earned by a cash basis taxpayer in a foreign country before becoming a resident is taxable under the Public Revenue Code if actually or constructively received after becoming a resident. In so holding, the Court of Appeals of Georgia has decided that *foreign source income is taxable in Georgia*. Such a decision is in direct conflict with the Commerce Clause of the Constitution of the United States and therefore repugnant to the Constitution.

Discussion of Question

Whether income earned in a foreign country before becoming a resident, but received after becoming a resident, is taxable income in Georgia?

The central issue in this case is the effect that *residence* has on the state's authority to tax. States derive their power to tax based on the Federal and State constitutions and the state's inherent authority over people and property in the state — that is, people residing within or working within the state and property located within the state. There is no question as to the state's authority to tax income of their residents, and nonresidents in certain cases, but their authority is questionable when timing differences exist between the *earning of the income* and the *collection of the income*. States even recognize their limited authority in this area and usually, as does Georgia, allow new residents to *pro rate* income in the year of arrival between their old residence and new residence. So, the central issue of what effect residence has on the state's authority to tax is intertwined with the issue of *what constitutes income?*

Income of a resident involves accounting, tax and legal concepts — all related. However, simply stated, income of a resident is just that — *income earned after the individual becomes a resident* of the state. Income earned before residence has been established is simply not relevant to the state. Income starts to accrue from the first day of residence and the *method of reporting* such income, be it cash, accrual or other basis as adopted by the taxpayer in his initial State income tax return, is applicable only to such income. There is no basis whatsoever for a State to get a "running tax start" and tax old, previously earned income that related to periods before the taxpayer became a resident of the State and subject to its jurisdiction.

Cash received by a resident is not automatically

income. Cash received can be a return of principal, a loan or received for many other reasons. The cash received by the Petitioner in 1972 and 1974 was a *collection of a receivable* that existed on the date the Petitioner became a resident of the State of Georgia, nothing more. To tax such amounts with an *income tax* is to apply the income tax as a *property tax* and this would be contrary to the general view that the income tax is not a property tax. *Forrester v. Culpepper*, 194 Ga. 744 22 SE 2d 595 (1942). The State doesn't tax, as income, furniture that was brought with the new resident when he physically arrived in the State. The State doesn't tax the new resident's automobile, his clothes, stocks, bonds, jewelry and so on. What is so unique about a receivable? The State will never tax, as income, these assets unless they are converted to cash, that is sold, at a price above their cost or other basis. The same should be true for a receivable. If a receivable is sold for more than its basis, income will be generated and that income will be taxable in Georgia.

Forrester v. Culpepper, 194 Ga. 744 22 SE 2d 595 (1942) is about the only significant judicial opinion we have as to the underlying *intent* of the Georgia Legislature in how the income tax law should be applied and this case is thirty-five years in history. In that case, the Supreme Court of Georgia, in interpreting the intent of the Georgia Legislature, stated:

> ". . . . . We think these sections of the Georgia income-tax law as to the imposition of the tax and statutory definitions, quoted above, when construed together, authorize if they do not compel the interpretation that the legislature did not intend to

> impose a tax upon such portion of the income of a resident as was derived by him from sources without the State before the date on which he became a resident of this State."

No mention is made of *receipt* of income prior to becoming a resident as stated in the decision of the Court of Appeals.

The headnote to *Forrester v. Culpepper*, 194 Ga. 744 22 SE 2d 595 (1942) is right on point with the position of the Petitioner in the instant case. It states:

> "The State income tax act does not authorize imposition of a tax upon such portion of income of a resident as was derived by him from sources without the State before date on which he became a resident of the State, notwithstanding such resident has not paid a tax outside the State on income earned outside of the State during period before he became a resident of the State."

This is exactly the situation we have in the instant case. The income excluded from the Petitioner's income tax returns in 1972 and 1974 was a *portion of income* received in 1972 (1974 in 1974 return) which was earned from 1969 to 1971 while a resident of the country of Greece. Or, stated another way, this income was derived from sources without the State, *that is Greece*, before the date the Petitioner became a resident of the State of Georgia, *that is November 1, 1971.*

The Court of Appeals of Georgia erred in overlooking the conflict between their decision and the requirement of Georgia Code Ann. §92-3118(a). The

Court of Appeals' decision would require income to be included in the year of receipt without regard to when the income was earned. Georgia Code Ann. §92-3118(a) requires the taxpayer to *clearly reflect* the income for the year. How can the income of the Petitioner for the years 1972 and 1974 *clearly reflect* the income for those years if such income includes amounts which were earned back in 1969, 1970 and 1971? It can't! Even the Commissioner has the authority to *correct* the income of a taxpayer to *clearly reflect* the income for the year. It is simply impossible to comply with Georgia Code Ann. §92-3118(a) and also comply with the decision of the Court of Appeals.

How about losses? What if the amounts in question represented losses applicable to the years 1969 to 1971? Would the State not disallow such losses as losses of another year? Losses of another country?

The importance of the concept of clearly reflecting income is indicated in the trend of current Tax Court decisions, rulings of the Internal Revenue Service, both of which are followed in Georgia, as well as the current attitude of the Congress. Cash basis taxpayers are now required, for example, to allocate interest paid over the period of benefit rather than to deduct the interest in the year of payment.

The Court of Appeals also erred in basing its opinion, in part, on a case that had nothing to do with the instant case. *Head v. Maxwell*, 60 Ga. App. 488, 490 4 SE 2d 45 (1939), dealt with the question of whether or not the State could tax income of a Georgia resident that was earned outside of the State and *after* the taxpayer became a resident. The instant case deals

with income, that is collection of a receivable, that was earned *prior* to the date the individual became a resident.

Neither the trial court nor the Court of Appeals has responded to the position taken by the Petitioner in the trial court that taxing income earned in a foreign country would be *unconstitutional* under the Commerce Clause of the Constitution of the United States. The Commerce Clause prohibits a state from levying any tax that imposes any burden on foreign commerce. The record shows that the Petitioner earned income in foreign commerce and, therefore, the State of Georgia would be prohibited from taxing such income under the Commerce Clause.

The significance of the limits on the State's power to tax is indicated in *Forrester v. Culpepper*, 194 Ga. 744 22 SE 2d 595 (1942) when the Court quoted an opinion delivered by Mr. Justice Holmes as follows:

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

The Court went on to observe that:

> "The language of a statute must be given a reasonable construction; and where susceptible of more than one meaning, it should be interpreted consistently with the Constitution."

Petitioner believes that sufficient doubt exists as to the State of Georgia's authority to tax income earned in a foreign country and earned before becoming a resident to exempt such income from taxation.

Finally, Petitioner would like to emphasize a few points that he has made to the Commissioner of Revenue, the Superior Court of DeKalb County, the Court of Appeals of Georgia and the Supreme Court of Georgia. This income was earned in a foreign country, not Georgia; it was earned before he even thought about becoming a resident of Georgia; it required enormous personal effort, sweat and family sacrifice; it had nothing to do with the State of Georgia. How the State of Georgia can tax this income is simply beyond belief!

CONCLUSION

Based on the reasons set forth herein, Petitioner respectfully requests that the Court grant this Petition and issue a Writ of Certiorari to review and reverse the judgment of the Court of Appeals of Georgia.

Respectfully submitted,

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Pro Se

August 5, 1977

APPENDIX A

COURT OF APPEALS OF THE STATE OF GEORGIA

FEB 8 1977

53244. ROGERS v. CHILIVIS, REVENUE COMMISSIONER Sh-17

SHULMAN, Judge.

The appellant-taxpayer earned income while in Greece from 1969-1971. In November, 1971, he became a resident of Georgia. The income from these previous earnings was paid to him in 1972 and 1974 while he was a resident, but was excluded by the taxpayer from his taxable income reported in his 1972 and 1974 Georgia tax returns, and no state income tax was paid on these earnings. The taxpayer did, however, report this income on his 1972 and 1974 federal tax returns and pay the taxes due thereon. Upon review of his state tax returns for these years the state revenue commissioner assessed the taxpayer for the taxes due on these excluded amounts. The Superior Court of DeKalb County upheld the assessment after the taxpayer's appeal to that court. To this court the taxpayer presents three enumerations of error.

The crux of each enumerated error is whether income earned by a taxpayer prior to becoming a resident, but received afterwards, is income taxable by the State of Georgia. Code Ann. §92-3101 imposes a tax upon the "Georgia taxable net income of the taxpayer." This is defined in Code Ann. §92-3107 as "the taxpayer's Federal adjusted gross income, as defined

in the United States Internal Revenue Code of 1954," with some adjustments not pertinent to this case. It is the taxpayer's contention that these code sections do not require the inclusion as income of money earned before he became a resident of the state.

In *Forrester v. Culpepper*, 194 Ga. 744 (22 SE 2d 595) our Supreme Court held that the State of Georgia could not tax the income of a resident which was "earned and collected" from sources outside the state *before* the taxpayer became a resident. In support of this the court said, quoting from *Interstate Bond Co. v. State Revenue Commission*, 50 Ga. App. 744, 751 (179 SE 559): "it is competent for a State to impose a tax upon the income of a resident, or a domestic corporation, whether such income be derived from sources within or without the State. 61 C.J. 1561 §2307. It is pertinent to note that following the last sentence, which is a quotation from Corpus Juris, it is stated in that text: 'except that it cannot tax a resident upon income *received* by him from sources outside the state at a time when he was *not* a resident thereof,' . . ." 194 Ga. at 748 (Emphasis supplied). Contrary to taxpayer's interpretation, we construe *Forrester* to mean that only income both earned *and* received prior to becoming a resident escapes taxation.

Moreover, when this taxpayer filed his first state tax return he therein elected to use a cash method of accounting. Under such method all income which the taxpayer actually or constructively received during the tax year is subject to taxation. "Cash basis taxpayers must report money *unconditionally* subject to their demand as income, even though they have not reduced it to possession." 33 AmJur2d Federal Taxation (1977) ¶2566, p. 583 (Emphasis in original). Code Ann. §92-3118(c) provides that a cash basis taxpayer is to include as income all earnings *received* during the tax year. This is in conformity with the cash method of accounting provided for in federal law, see 33 AmJur2d Federal Taxation (1977) ¶1560 et seq., and this state's usage of federal taxable income as the basis for determination of state taxable income. Code Ann. §92-3107.

In this connection it is important to note that this taxpayer included the disputed income in his 1972 and 1974 federal tax returns. Under the authority of Code Ann. §92-3107 the revenue commissioner properly used the taxpayer's federal taxable income in ascertaining his state taxable income, and correctly inferred from the taxpayer's federal tax returns that the disputed income was either actually or constructively received in 1972 and 1974. Furthermore, as we said in *Head v. Maxwell*, 60 Ga. App. 488, 490 (4 SE 2d 45), " '(E)ntire net income,' as used in §92-3101, is nowhere limited to a net income earned solely within the State of Georgia . . ."

It is quite clear to this court that income earned by a cash basis taxpayer outside the state before becoming a resident is taxable under the Public Revenue Code if actually or constructively received after becoming a resident. There is no merit to any of the three enumerations of error.

Judgment affirmed. Quillian, P. J., and Stolz, J., concur.

Court of Appeals of the State of Georgia

Clerk's Office,
Atlanta, Aug. 1, 1977

I hereby certify that the foregoing pages attached hereto contain a true and complete copy of the opinion of the Court of Appeals of Georgia in the case therein stated, as appears from the original of file in this office.

Witness my signature and the seal of said court hereto affixed the day and year above written.

/S/ MORGAN THOMAS Clerk.

APPENDIX B

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta, February 25, 1977

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

53244. P. D. Rogers v. N. P. Chilivis, Revenue Comm'r

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta, Feb. 25, 1977

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/S/ MORGAN THOMAS Clerk.

32290 **APPENDIX C**

SUPREME COURT OF GEORGIA

Atlanta, April 22, 1977

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Philip D. Rogers v. Nick P. Chilivis, Comr.

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. Nichols, C. J., Undercofler, P. J., Jordan, Ingram, Hill and Hill, JJ., concur.

Supreme Court of the State of Georgia

Clerk's Office, Atlanta, May 18, 1977

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/S/ JOLINE B. WILLIAMS Clerk.

Case No. 53244

Court of Appeals of Georgia

Remittitur from Supreme Court

Filed in office

Clerk Court of Appeals of Georgia

32290 **APPENDIX D**

SUPREME COURT OF GEORGIA

Atlanta, May 11, 1977

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Philip D. Rogers v. Nick P. Chilivis, Comr.

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Ingram, J., dissents. Bowles, J., not participating.

Supreme Court of the State of Georgia

Clerk's Office, Atlanta May 20, 1977

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/S/ HAZEL E. HALLFORD Deputy Clerk.

APPENDIX "E"

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

PHILIP D. ROGERS,
Appellant,

vs.

NICK P. CHILIVIS, COMMISSIONER
DEPARTMENT OF REVENUE,
Appellee,

Decided and Filed August 30, 1976

Extract of Portion of Trial Court Record

The taxing of income earned in a foreign country may even be unconstitutional under the Commerce Clause of the United States Constitution. The Constitution of the United States, Article 1, Section 8, Clause 3, regarding the Regulation of Commerce, states;

> ". . . . . The Congress shall have the power . . . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The purpose of this Clause has been clarified in numerous cases of which the following seem typical:

> "The purpose of this provision empowering Congress to regulate commerce with foreign nations

and among the several states, was to assure the free and unimpeded transportation and exchange of goods between the states, and hence such provision prohibits regulation of the interstate commerce by the states since implicit in grant of power to Congress is prohibition of exercise of same power by the states." *Armstrong vs. City of Tampa, Fla.* 118 So. 2nd 195 (1960)

Foreign commerce has been defined as follows as it relates to individuals:

"Commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments as individuals." *United States vs. Holliday, Mich.*, 70 U.S. 407, 3 Wall 407, 18, L. Ed. 182 (1866)

Taxpayer was a resident of the country of Greece at the time the income was earned and a resident of Georgia at the time the income was received. He was engaged in the practice of public accounting in Greece and, as such, provided public accounting services to citizens of Greece and citizens of other foreign countries. So, it would seem that this taxpayer was engaged in foreign commerce when the income was earned. The fact that the income was received after the taxpayer became a resident is not considered as relevant as the source of the income. This is foreign source income. States are prohibited from levying any tax that imposes a burden upon foreign commerce. Taxpayer believes the income tax on this foreign source income is such a burden.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served three copies of this Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia upon Repsondent and counsel for Respondent by depositing same in the United States Mail in envelopes with adequate postage thereon and addressed as follows:

NICK P. CHILIVIS, COMMISSIONER
Department of Revenue
State of Georgia
Trinity-Washington Building
Atlanta, Georgia 30334

and

FRANKLIN N. BIGGINS
Assistant Attorney General
The Department of Law
State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

This 5th day of August, 1977.

PHILIP D. ROGERS
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